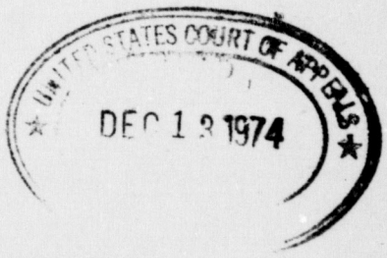
United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2390

To be argued by
GRETCHEN WHITE OBERMAN



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

ZACHARY MORGAN :

Plaintiff-Appellant :

-against- : Docket No. 74-2390

ERNEST MONTAYNE, Warden of :
Attica State Prison, Correction
Officer Steggs, et. al. :

Defendants-Appellees :

- X

BPJs

BRIEF FOR PLAINTIFF-APPELLANT

On Appeal from an Order of the
United States District Court for the
Western District of New York, Dismissing
a Civil Rights Act Complaint

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BRIEF FOR PLAINTIFF-APPELLANT

QUESTIONS PRESENTED

1. Whether the complaint stated a good cause of action for deprivation of plaintiff's rights under the First, Sixth and Fourteenth Amendments when it alleged that prison authorities, acting under color of law, had opened and read mail from plaintiff's attorney of record concerning his pending judgment appeal.

2. Whether, on the facts presented by affidavits of both parties, summary judgment for the plaintiff on the issue of liability must be granted; or, alternatively, whether the case must be remanded for a trial upon disputed issues of fact.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal by the plaintiff Morgan from an order of the United States District Court for the Western District of New York (Hon. John T. Curtin, D.J.) entered on June 10, 1974, dismissing plaintiff's civil rights complaint.

On October 30, 1974, this Court granted plaintiff leave to appeal on the original record and typewritten briefs and assigned Gretchen White Oberman, Esq. as counsel pursuant to the Criminal Justice Act.

Statement of Facts

a) The Complaint

On July 31, 1973, by verified complaint, plaintiff sought to initiate a pro-se civil action pursuant to 42 U.S.C. §§1983, and 1985 and 28 U.S.C. §§1331 and 1343, seeking a restraining order and money damages in redress of his constitutional right to private legal communications. The complaint alleged that plaintiff was a prisoner at Attica State Prison, that incoming mail from plaintiff's attorney of record had been censored and that pages were missing from his brief on appeal as a result of the incoming censorship, in violation of his rights under the First, Fifth, Sixth and Fourteenth Amendment. The complaint was accompanied by

an application to proceed in forma pauperis and for assignment of counsel.

The complaint specifically alleged that on July 14, 1973 Plaintiff received a letter from his appellate counsel in regard to his appeal, (then pending in the New York Supreme Court, Appellate Division, Second Department); that the letter was opened and censored outside Plaintiff's presence and that there was no actual or legal excuse for this act, since the attorney had "been on [Plaintiff's] correspondence since July, 1972" (R 1, p.3)*

The complaint further alleged that on July 23rd, Plaintiff received a copy of his appeals brief, opened outside his presence, with pages missing. (R 1, p.3). Plaintiff alleged that "the defendants conspired together to deny Plaintiff his legal privacy by censoring the contents, destroying and, or confiscating a few pages of his brief." (R 1, p.4)

Upon receipt of the complaint, the district court permitted filing of the complaint in forma pauperis (A 1), but ordered the defendants "to show cause why petitioner should not be allowed to proceed further in forma pauperis." (A 2)

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* References to the original record are prefaced 'R' and give the document number, followed by the page number of the document. References to the Plaintiff's Appendix are prefaced 'A'.

b) The Defendants' Affidavit In Opposition

The defendants, by a New York State Assistant Attorney General, filed an "affidavit in opposition" to the "application" requesting that it be denied on the ground that annexed affidavits of two correction officers "adequately and fairly answer the claims herein made by the petitioner." (R 3, P.1)

Stephen Seeley, a correction officer, submitted an affidavit stating that on July 14, when Plaintiff received the letter from his attorney:

> "...I was assigned to work in the Correspondence Department. I was unable to deliver mail personally due to a broken ankle and I was on crutches. I have no personal recollection of opening or censoring the lawyer's letter..." (R 3, p.2)

The officer also stated that legal mail entering the facility is handled in accord with Administrative Bulletin #20 (copy set out in plaintiff's Appendix, A7); and that legal mail in an envelope "bearing no return address or bearing no indication that the correspondence is from an attorney..." is opened in the Correspondence Department. (R 3, p.2) There was however, no allegation that the regulation was followed in this instance or that the letter in question did not bear a proper return address. The affidavit concluded by stating that if the letter was opened by a prison employee it was done so "inadvertenly"[sic] (R 3, p.3)

Harold Steggs filed an affidavit stating that Plaintiff's claim as to the brief "is not true, as all special correspondence rules relating to legal work sent by lawyers is [sic] followed and governed by Administrative Bulletin #20..." (R 3, p.4). The affidavit further stated that "In this instance, the petitioner's legal mail was opened before him on July 23, 1973, examined and given to him." (R 3, p.4)

c) The Plaintiff's Reply Affidavit and Documents.

Plaintiff immediately filed a rebuttal affidavit offering to submit documentary proof that Seeley was incorrect in claiming that administrative regulation #20 was routinely followed and in claiming that opening of this letter, if it occurred, was done so inadvertently. The proferred proof was that mail from the attorney had been tampered with over an extended period of time. (R 4, p.3)

Plaintiff also alleged that there was "no logical nexus between the censoring of my legal mail and the physical handicaps [Seeley] labored under during that period" since it was prison policy to have several officers supervise the distribution of legal mail. (R 4, p.2)

As to the Stegg affidavit, Plaintiff alleged that he had a letter from Stegg dated July 24, 1973, which belied the facts set forth in the affidavit. (R 4, p.3)

The District Court directed Plaintiff to submit an affidavit and any additional material to support these claims, (A 3)

Plaintiff then filed the second reply affidavit and documents, annexing three letters from his attorney, F.S. Polestino, St. John's University School of Law, postmarked July 12, August 7 and August 31, 1973, all of which bore a general and not a legal correspondence stamp*, both on the envelopes and the internal contents. (Ex. 3a, b and c, annexed to R. 6) He alleged that the opening and censoring the three letters negatived Seeley's claim that if a legal letter had been opened outside Plaintiff's presence, it was done so inadvertently. (R 6, p.1) Moreover, two of these letters were opened and censored after Plaintiff complied with Stegg's request to show proof that his attorney was admitted to the bar. (see intra, p 7) Hence even if Ex. 3a was opened inadvertently, the same excuse could not apply to Ex. 3b & 3c (R 6, p.2)**

As to the Stegg affidavit, Plaintiff submitted a letter from Stegg (Ex. 1A) received July 23, in response to Plaintiff's letter complaining that the attorney's brief had been opened and had pages missing. (Ex. 1). The Stegg letter states:

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* Plaintiff had alleged, without contradiction, that there are two different stamps put upon incoming mail: a general correspondence stamp and another stamp for incoming legal mail. (R 4, p.4) Plaintiff also described the different procedures used for general correspondence and legal correspondence. (R 4, p)

** It should be recalled that the complaint in the instant action was sworn to July 31, 1973, before Ex's 3b and 3c were received.

> Mr. Morgan: No one is abusing your right to legal mail, but it is difficult to assume that these Schools of Law are run by competent attorneys. Show me proof that this man was admitted to Law Bar your legal to and from him will be treated as private legal mail— For your information contents of envelope was not censored" (emphasis in the original) (Pet. Ex. 1A annexed to R.6)

Plaintiff responded by sending Stegg a legal letterhead containing Polestino's name and his notation that Polestino had been a Professor of Law at St. John's since September of 1972. (Ex. 2 annexed to R 6)

Plaintiff also submitted to the Court the envelope from the Polestino brief which gave his return address as St. John's University School of Law and which bore the typed legend "Attorney-At-Law." (Pet. Ex. 1B annexed to R 6) Plaintiff further alleged that his "attorney of record card is kept in [Stegg's] office, plus the lawyer's directory is housed in his office." (R 6, p.3)

Plaintiff also annexed to his reply affidavit correspondence between himself and the attorney concerning the missing pages of the brief (P-Ex. 3 and 3A annexed to R 6), wherein the attorney wrote that he "was disturbed to learn that a part of the brief I had sent to you was missing." (Ex. 3A) The face of the letter was marked with the general, not the legal correspondence stamp, although it was received after Plaintiff had complied with Stegg's July 23 request for proof of attorney.

d) The District Court Decision

The District Court dismissed Plaintiff's application and also denied permission to appeal in forma pauperis by order of June 10, 1974. The court held:

> "Respondent's contend that if the envelopes were opened before they were given to petitioner, they were opened by mistake. The envelopes are marked with a return address from St. John's University School of Law. Because of the return address, the court finds it possible for respondents to be confused as to whether or not the correspondence were in question was legal correspondence. At any rate, the court finds that respondent's conduct here was constitutionally permissible under Sostre v McGinnis, 442 F2d 178 (2 Cir, 1971, and thus petitioner's application must be dismissed." (A 5-6)

The Procedure Below

In this case, as in United States ex rel Haymes v Montanye, -F2- Slip Opin. 21, 25 (2 Cir, 10/4/74) the district Court "dismissed [the] application for relief under the Civil Rights Act" after considering affidavits and exhibits submitted to him by both sides. Moreover, as in Haymes there is no indication that the court found Morgan's claims to be frivolous under 28 U.S.C. §1915(d). Therefore, as in Haymes, the "disposition perforce was summary judgment. F.R.Civ.P. 56" (Slip Opin. at 25)

In Rickey v Wilkins, 335 F2d 1 (2 Cir, 1964) and

Urbano v News Syndicate Co., 358 F2d (2 Cir, 1966), the Court held that dismissal under 28 U.S.C. §1914(d) is not appropriate where a complaint, on its face, states a good cause of action. In Dimond v Pitchress, 411 F2d 565 (9 Cir, 1969) the Ninth Circuit specifically disapproved the practice of dismissing an action under §1914(d) by weighing the credibility of a complaint against the credibility of governmental records. It held that a district court may resolve factural issues bearing upon the decision to grant or deny an in forma pauperis application "only if the allegation lack veracity or legal substance either on their face or in light of facts properly subject to judicial notice." While we believe it may be appropriate for this Court to reaffirm the Rickey and Urbano holdings in more explicit fashion than was done in Haymes, we recognize that the court in that case did not consider the procedure employed below so improper as to constitute an impediment to proper appellate review.

POINT I

PLAINTIFF STATED A GOOD CAUSE OF ACTION UNDER THE CIVIL RIGHTS ACTS BY ALLEGING THAT THE DEFENDANTS, ACTING UNDER COLOR OF LAW, VIOLATED HIS RIGHTS UNDER THE FIRST, SIXTH AND FOURTEENTH AMENDMENT BY FAILING TO TREAT AS CONFIDENTIAL AND PRIVILEGED CORRESPONDENCE FROM HIS ATTORNEY OF RECORD CONCERNING A PENDING CRIMINAL APPEAL. MOREOVER, ON THE FACTS ADDUCED BELOW, SUMMARY JUDGMENT FOR THE PLAINTIFF SHOULD BE GRANTED ON THE ISSUE OF LIABILITY OR AT THE LEAST, THE CASE REMANDED FOR A TRIAL ON THAT ISSUE AS WELL AS THE ISSUE OF DAMAGES.

a. Sostre v McGinnis Insofar As It Permits Routine Opening and Reading Of All Outgoing and Incoming Attorney-Client Correspondence, Must Be Overruled.

There has been a substantial flow of water over the dam since this Court held in Sostre v McGinnis, 442 F2d 178, 199-201 (2 Cir. en banc, 1971) cert. den. 404 US 1049 & 405 US 978 (1972) that any correspondence between an attorney and his prisoner client, and mail to and from public officials, may be opened and read by the prison administration without infringement of any constitutional rights.

We believe that in light of subsequent cases, the Sostre decision on correspondence between an attorney and his incarcerated client must be re-examined for a variey of interrelated reasons. First, recent Supreme Court decisions have cast substantial doubt upon the continued vitality of the basic underlying approach to this problem taken in Sostre. Second, even before the Supreme Court cases, other decisions in this circuit subsequent to Sostre have diminished the force of its holding to such an extent that it is highly doubtful that the rule is being followed as originally stated. Lastly, we believe that the Court in Sostre did not fully consider the paradox resulting from the fact that oral attorney-client communications are accorded substantially greater constitutional protection and the resulting iniquities which flow from permitting a laxer standard of

constitutional protection for written communication of precisely the same genre.

(1) The Impact of Recent Supreme Court Cases Upon the Sostre Decision.

In a trilogy of recent cases, the Supreme Court has begun to define a standard of review for prison mail censorship cases that will be responsive both to the Constitutional principles at stake and the competing needs of prison authorities to maintain internal order, discipline and institutional security and promote the rehabilitation of prisoners. Procunier v Martinez, 416 US 396 (1974); Pell v Procunier, -US- , 41 LEd 2d 495 (1974) and Wolff v McDonnell, -US-, 41 LEd 2d 935 (1974). The standard there defined is a different formulation than the basis for review utilized in Sostre.

In Procunier v Martinez, supra, 416 US at 406-07, a case dealing with general correspondence censorship, the Court disapproved the Sostre approach of requiring "only that censorship of personal correspondence not lack support 'in any rational and constitutionally acceptable concept of a prison system.' " The Court held that mail censorship "implicates more than the right of prisoners" since it also "works a consequential restriction on First and Fourteenth Amendment rights of those who are not prisoners." 416 US at 408-09. Consequently, the Court refused to permit justification of censorship by reference to "certain

assumption about the legal status of prisoners. It looked instead to traditional "decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities." 416 US at 409. Accordingly, censorship of general (not legal) prisoner mail is justified only if the censorship regulation furthers a substantial governmental interest other than suppression of expression and further provided that the limitation on First Amendment freedom is no greater than necessary to protect the particular interest involved. 416 US at 413. Even a restriction that furthers a substantial governmental interest will be invalid if unnecessarily broad. 416 US at 414. Moreover, any decision to censor or withhold delivery of a particular letter must be accompanied by minimal procedural safeguards. 416 US at 417

Martinez also invalidated a prison restriction upon physical access of prisoners to legal assistante on Fourteenth Amendment grounds. (416 US at 419)

The second case, Pell v Procunier, supra, while not involving mail censorship, did require resolution of other First Amendment claims. A regulation restricting person visits to certain categories of persons excluding newsmen was held constitutional, using the Martinez test. In addition to finding a substantial governmental interest for the regulation other than suppression of information, the Court emphasized that so long as

other "reasonable and effective" means of communication remained open, with no discrimination in terms of content, then a narrowly drawn regulation restricting face-to-face contact could be enforced. 41 LEd 2d at 502-504.

In Wolff v McDonnell, supra, the last of the three cases, the Court held that a procedure whereby mail from attorneys specially designated as such, is opened and inspected --but not read--in the prisoner's presence in order to detect contraband does not infringe rights under the First, Sixth or Fourteenth Amendments. Because of the narrow factual issue presented for review, the Court deemed it unnecessary to determine the perimeters of those Amendments in all types of cases involving attorney-client mail communication.

Each of these cases calls for a reexamination of the Sostre holding. Sostre is premised on the theory that inroads into otherwise protected areas of speech are justified so long as they have some rational basis in prison administration, without regard to whether the asserted governmental interest is substantial and unrelated to restriction of expression or to whether the First Amendment limitation is no greater than necessary to protect the particular interest involved.

Cases employing a Martinez type analysis have uniformly concluded that the practice of reading the contents attorney-

client (and prisoner-public official) correspondence violates the First Amendment because the asserted governmental interest in monitoring such mail to --ie to detect escape plots and other unlawful schemes-- is so insubstantial, that under a least restrictive alternative test, routine inspection of this type of correspondence cannot be sustained. See "Prison Mail Censorship and the First Amendment", 81 Yale L.J. 87, at 98-99 (1971) and cases cited in fn. 72; Smith v Robbins, 454 F2d 696, 697 (1st Cir, 1972); Coleman v Peyton, 362 F2d 905, 907 (4th Cir, 1966); Marsh v Moore, 325 F. Supp. 392, 395 (D. Mass, 1971); Gates v Collier, 349 F. Supp. 881 (N.D. Miss, 1972); Conklin v Hancock, 334 F. Supp 1119 (N.D. N.Hamp. 1971);* Nelson v Heyne, 355 F. Supp. 451 (N.S. Ind. 1973): Freeley v McGrath, 314 F. Supp. 679 (S.D.N.Y., 1970); see also Payne v Whitmore, 325 F. Supp 1191 (N.D. Cal, 1971).

The underlying basis for these decisions is that since the likelihood that courts, pulic officials or members of the bar would engage in illegal plots and schemes is so slight, no substantial governmental interest is furthered by permitting prison

* The Conklin decision, supra, is most instructive for there the court found that even though plaintiff was a high security risk because of a record of prison escapes, and though ordinary mail could be read to determine whether or not escape plans were being formulated, no mail to or from plaintiff's attorney of record or public officials could be opened because of the minimal risk that these persons would be party to such illegal activities.

officials to monitor this type of correspondence.* Moreover, since completely private personal consultation between attorney and client is uniformly permitted (if not constitutionally mandated, see (intra, pp 21), it hardly behooves prison official to insist that they must monitor written communications in order to insure prison security.

A second factor militating against the Sostre result is that once reading of legal mail is permitted no other "reasonable and effective" means of private legal communication remains open in the vast majority of cases since mail communication on legal matters is generally the only available avenue of communication for the convicted prisoner. Consequently, the reading of legal mail does place an obstruction on access to the Courts.**

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* The few cases where an attorney has been disciplined for matters contained in monitored written communications to prison clients involve remarks deemed disrespectful and contemptuous, rather than escape plots or the like. See for example In re Bull, 123 F. Supp. 389 (D.C. Dist. 19); In re Chopak, 66 F. Supp. 265 aff'd 160 F2d 886 (2 Cir, 1947).

Moreover, liberalized prison regulations in this and other states prohibit reading of legal correspondence. See N.Y. State Dept. of Corr. Admin. Bull. #20 (A 7); Wolff v McDonnell, supra (Nebraska) and Stern "Prison Mail Censorship-A Non Constitutional approach" 23 Hastings L.J. 995, 1005n.50 (1973) (State of Washington) Apparently the rate of attorney assisted escapes in these jurisdictions does not compare unfavorable with those in jurisdiction which still read such correspondence in order to detect them.

** One author states that routine reading of legal mail some times leads to harrassment when it is discovered an inmate has complained about prison conditions, and that some prisons have

(cont. next page)

Prisoners are not permitted to travel to courts or public officials to present legal matters privately. While attorneys are permitted to travel to the prisons and consult privately with clients, we believe that in the overwhelming majority of cases, this kind of communication is the exception rather than the rule. Many, if not most, attorneys are assigned and cannot be expected to make the donation of time and the out-of-pocket outlay necessary to travel to the various prisons to discuss legal problems. State appeals take substantial time to complete* and state prisoners are not generally held in an institution near the appellate court until the case is disposed of to permit personal access to counsel. Moreover, even where counsel is retained, the cost of transportation to the prisons and the inconvenience in

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* In this case, more than a year elapsed between assignment of counsel and perfection of the appeal.

** (footnote continued) punished inmates when it was learned that writs were being filed. Stern, Supra, 23 Hastings. LJ at 1016. See also Wells v McGinnis, 344 F. Supp. 594 (SDNY, 1972), where when plaintiff commenced a civil rights action, he was transferred to limit communication with his attorney.

The author also notes that the purpose and the necessities of the relationship between a client and his attorney require the ability on the client's part, to make the fullest and freest discloser of his objects, motives and actions, citing 2 Meecham, Agency, §2297 at 1877 (2nd Ed., 1914).

terms of time is such that a letter, not a personal visit, is the normal channel of communication.*

Several cases have recognized the practical problems invclved and have held that where monitoring of attorney-client correspondence is permitted, then unlimited private access between attorney and client must be made possible in order to prevent infringment of Sixth, and Fourteenth Amendment rights. Haas v United States, 344 F2d 56, 67 (8th Cir, 1965) (defendant and attorney in same city and attorney given unlimited private access, therefore no deprivation of constitutional right. "If, for example, the use of the mails constituted the only method whereby defendant and his counsel could communicate with each other and such means of communication was censored, certainly the defendant then would have been deprived of his constitutional rights."); United States ex rel Ormento v Warden, 216 F. Supp 609 (D. Kan, 1963) (since mail censored and defendant too far away to consult privately with retained counsel, his right to counsel on appeal impaired and defendant must be transferred closer to counsel); Rhem v McGrath, 326 F. Supp 681, 691 (SDNY, 1971) (if no private place to consult with counsel provided, then authorities should desist from opening attorney's letters.)

* For example: Round trip plane fare to Dannemora is $84, to Auburn, $58. Ground transportation from the airports to the prisons is extra. Both trips take a full day.

In light of the foregoing, it seems clear that the Sostre decision--insofar as it holds that opening and reading of all legal written communication is constitutionally permissible--must be reexamined and disapproved.

(2) Cases In This Circuit Subsequent To Sostre Have Diminished the Force Of Its Holding on Legal Mail Censorship To Such An Extent That Its Modification Or Overruling Is Necessary.

The most recent statement of what the Sostre case holds is that contained in United States ex rel Haymes v Montanye, -F2d- (2 Cir, Oct. 1974) (Slip. Opin 21 at 24):

> "...this court decided, in Sostre v McGinnis [citation omitted] that censorship of inmate letters to courts, lawyers and public officials violated the first amendment rights of prisoners."

Censorship generally means deletion from correspondence or withholding it altogether. In Sostre the court reasoned that opening and reading of legal correspondence had to be permitted since prison authorities did possess the power to censor such correspondence without violating First Amendment rights. If Sostre has been interpreted to mean that censorship of legal correspondence cannot take place, then the legal underpinning for permitting such mail to be read no longer exists. If prison authorities cannot delete from or withhold legal correspondence, then what administrative interest remains to be served by permitting the content of this mail to be perused by them?

An analysis of cases subsequent to Sostre shows that while all of them pay lip service to Sostre, none of them has ever sanctioned censorship of legal correspondence either in practice or in principle.

In Wright v McMann, 460 F2d 126 (2 Cir, 1972) the Court affirmed a district court order prohibiting official censorship (ie impeding or otherwise interfering with) of attorney-client correspondence, although it refused to prohibit officials from opening and reading such mail. When the case was decided, Department of Correction policy was to refrain from opening legal correspondence, and hence the Court found no need to transform the administrative policy into constitutional doctrine.

In Goodwin v Oswald, 462 F2d 1237 (2 Cir, 1972), the Court affirmed an order directing the Warden to deliver certain attorney-client communications which had been withheld by prison officials, stressing that:

> "...the provision of effective assistance requires the opportunity for confidential communication between attorney and client on pending litigation and related legal issues." (462 F2d at 1241)

The narrow issue in the case was delivery of certain letters and since that issue was disposed of by the district court order, the Court, once again, felt no pressing need to go beyond the issue in the case to require judicial enforcement of the general

prison policy against reading attorney-client mail. See also Wilkinson v Skinner, 462 F2d 670 (2 Cir, 1972), where the Court found no need to order injunctive relief against interference with legal mail because amendments to prison regulations subsequent to the filing of the complaint, adequately protected the constitutional rights at issue and rendered the case moot, but where the decision reiterated and emphasized the importance of those First and Sixth Amendment rights.

Since Sostre has invariably been applied to prohibit censorship of attorney-client correspondence, and since it has been interpreted as holding that censorship of legal mail would violate First Amendment rights, there is no good reason to continue to espouse the principle that prison authorities nonetheless have power to open such mail in order to be able to censor it.

Moreover, the vice of leaving the decision stand is that an unnecessary tension is created between what the Court has said in Sostre and what the Court has done in that subsequent cases,leaving no clear cut principle to guide district courts in deciding cases, such as this one, where constitutional violations resulting from official opening of legal mail are alleged to exist.

In sum the Sostre holding that no constitutional rights are violated by opening and reading legal correspondence is not only called into question by subsequent Supreme Court decision, but its viability was also been diminished in essential part by

subsequent decisions in this Court. We believe that the holding must be re-examined and that for the reasons set forth below, the decision should be overruled.

(3) Since Oral Attorney-client Communications Are Constitutionally Protected From Governmental Monitoring, There is no Reason, In Law or Logic, to Sanction Reading of Written Attorney-client Communications. Moreover, Gross Inequities Result from Adhering to Such a Double Standard.

A long line of decisions have made it clear that oral communications between an attorney and his client are to be treated as confidential and privileged, and that any governmental intrusion into a private discussion, between counsel and a criminal defendant violates the defendants constitutional rights, whether or not done with the highest motives, and without proof of harm. United States v Lebron, 222 F2d 531, 534 (2 Cir, 1955); United States ex rel Cooper v Denno, 221 F2d 626, 628 (2 Cir, 1955); Coplon v United States, 191 F2d 749, 757-760 (D.C. Cir, 1951); United States v Seale, 461 F2d 345, 364-5 (7 Cir, 1972); Caldwell v United States, 205 F2d 879, 881 (D.C. Cir, 1953); Matter of Fusco v Moses, 304 NY 424 (1952) (applies to disciplinary proceeding as well as criminal case); Thomas v Mills, 157 NE 488 (Ohio, 1927) (refused to permit private consultation with attorney concerning appeal violates due process); State v Cory, 382 F2d 1019 (S. Ct. Wash. en banc, 1963), and cases cited therein.

In Lanza v New York, 370 US 139, 143-44 (1962), the Supreme Court while holding that conversations between relatives could be monitored in prison because it is not an area protected by the Fourth Amendment, was careful to state, citing to Coplon, supra:

> "Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection..."

In Black v United States, 385 US 26 (1966), O'Brien v United States, 386 US 345 (1967 and Schipani v United States, 385 US 375 (1962), the Supreme Court summarily reversed and remanded for new trials in cases where the Solicitor General advised the Court that monitoring agents had overheard conversation between attorney and client. Se also Hoffa v United States, 387 US 231, 233 (1967) remanding for a hearing in a somewhat similar situation even though "there was apparently no direct intrusion here into attorney-client discussions."

The constitutional basis for these decisions are the Sixth Amendment right to effective assistance of counsel and the Fourteenth Amendment right to due process--the same constitutional provisions which this Court envoked in Goodwin v Oswald, supra, 462 F2d at 1241.

It seems an extraordinary paradox that while courts are most vigilant to protect against governmental monitoring of

private oral communications between attorney and client in order to safeguard the right to counsel and the right of access to the courts, that a similar protection against governmental monitoring of private written communications of precisely the same genre is not imposed with equal rigor in order to safeguard those self-same rights.

The only thing accomplished by perpetuating the dual standard is to denegrate the Sixth and Fourteenth Amendment rights of the defendant who cannot afford to pay an attorney to journey to the prison for private consultation, but who must rely on the mail for all attorney-client communication. The defendant who can pay* can expect full constitutional protection for confidential communication with counsel, and the man who cannot pay can expect to have all communications to and from his attorney opened and read. Prison practices which result in such inequities deny equal protection of the law. c.f. Dowd v Cook, 340 US 206(1951) and Cochran v Kansas, 316 US 255 (1942).

Since an attorney can go to an institution to consult privately with his client about any matter,** it is contradictory

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* or who can make bail after judgement

** The lawyer's professional responsibility to adhere to the canons of ethics-rather than the censor's ear--is the only guarantee that illegal schemes will not be discussed orally and prison officials, and the courts, need require no greater guarantee that illegal written communication will not take place.

and discriminatory not to allow the same persons the same right of private consultation just because the communication takes the form of a letter, rather than a personal visit.

We submit that the rule announced in Sostre -- that attorney-client correspondence can be opened and read in order to determine whether it need be censored -- must be abandoned. The holding flows from a premise which was rejected by the Supreme Court -- that restriction upon fundamental constitutional rights is tolerable as long as there is some rational support for the practice in any acceptable concept of a prison. Instead, the Court must now determine whether the restriction furthers a substantial governmental interest other than suppression of expression. We submit, and have shown, that it does not. The Sostre holding also fails to consider whether the limitation thus imposed upon First Amendment rights is no greater than necessary to protect the governmental interest asserted. We submit and believe we have shown, that it is. While there may be justification for the practice of opening and inspecting mail from an attorney to detect the presence of contraband,* any further intrusion into the privacy of the attorney-client

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* Especially because contraband in the prison sense, is any article (not only illegal articles like weapons or narcotics) which cannot be sent to a prisoner. See for example 7 N.Y. Codes Rules & Reg's Correctional Services, Part 54 (Packages or Articles Sent or Brought to Institutions). Thus an attorney unfamiliar with prison regulations may unwittingly enclose articles in a letter which are prohibited and which, therefore, are contraband.

relationship is over broad and unwarranted, especially because it effectively closes the one avenue of private communication open to the prisoner-client in the majority of cases. Moreover, the enforcement of a rule that prison officials may monitor written communications between attorney and client conflicts with the well-established principle prohibiting monitoring of oral communications of the same nature. The net result is not only to discriminate against the indigent, but to undercut the justification given by prison officials for the correspondence restriction. Since oral communication between attorney and client can and do take place in private without damage to internal prison order and security, there is no reason to monitor the content of such communications simply because they happen to be written. This Court subsequent to Sostre, perhaps recognizing the Constitutional difficulties inherent in the Sostre holding, has refused to apply it full force in any case. The decision, in the respect it permits opening and reading of any letter from or to an attorney, should therefore be overruled.

b. The Plaintiff is Entitled to Summary Judgment on the Basis of the Affidavits and Exhibits Filed in the Court Below; Alternatively, the Case Must Be Remanded for A Trial On Disputed Issues of Fact.

Plaintiff alleged that three* letters and one communication containing a brief from his attorney of record (who had been on Plaintiff's correspondence for a year) were opened and read outside his presence, and that pages of the brief were missing when it was given to him by prison authorities in violation of his constitutional rights (supra, pp 2-3).

The defendant then asked for dismissal of the action, based upon affidavits. The Seeley affidavit related to the letter and averred that Seeley could neither affirm or deny that the letter was opened; suggested that if the letter were not opened in Plaintiff's presence, it was because Seeley was physically incapacitated from taking it to him; offered another excuse not germane to the case (that Admin. Bull. #20 (A7-11) was not followed where letters did not bear proper return addresses etc.); and concluded by stating that if the letter was opened, the act was "inadvertent" (supra, P. 4).

The Stegg affidavit related to the brief. It contained Stegg's personal conclusion that Plaintiff's claim was not true for the reason that Admin. Bull #20, according to Stegg, is always followed. It also contained the statement that Plaintiff's legal

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* Although the complaint initially covered only one letter and the brief, subsequent to the filing of the action, two more letters were received. (supra, P 6) Plaintiff alleged that they came to him in the same condition as the first one. Under F.R. Civ. P. Rule 15(b), this expanded allegation should be construed as an amendment to the pleadings. 6 Moore's Federal Practice, §56.10, at pp. 2126-27, esp'ly n. 7.

mail was opened before him on July 23 without stating whether Stegg was present when this occurred or whether this statement was made upon information and belief. (supra, p 5)

Plaintiff then filed two affidavits (R 4 & R 6) in reply, with supporting documents. None of the facts alleged in these affidavits were ever contraverted by the defendants, nor were the documents explained, even though 5 months elapsed between Plaintiff's final submission to the district court and the district judge's decision.

As to the Seely affidavit, Plaintiff alleged that not one, but three letters from the attorney Polestino, were opened outside his presence. Hence any defense of 'inadvertence'(even if legally pertinent) could not be maintained on the facts. He produced each letter, bearing the general, not the legal, correspondence censor stamp. The stamps proved that none of the letters had been processed in accord with Admin. Bull. #20; and that the last two were not treated as "legal" correspondence even though Plaintiff had produced proof as requested, that Mr. Polestino was a member of the bar before they were received.

Moreover, Plaintiff had earlier alleged that Polestino had been on his correspondence for a year, and according to Admin. Bull. #20.5, a record of incoming and outgoing correspondence is maintained (A8;A10). Plaintiff further alleged that an attorney of

record card and a lawyers directory was maintained in Stegg's office so presumably no real need existed for Plaintiff to furnish any additional proof Polestino was a "competent attorney." (supra, pp. 5-7)

As to the Stegg affidavit, Plaintiff demonstrated that it was in utter contradiction to an earlier communication from Stegg on the subject of the attorney's brief. Whereas the Stegg affidavit states that the brief was opened in Plaintiff's presence, the Stegg letter, written after the brief was delivered, states that mail from Polestino "will be treated as private legal mail" once Plaintiff showed proof "that this man was admitted to Law Bar." (Supra, p 7) According to Stegg, the proof was necessary as "it is difficult to assume that these Schools of Law are run by competent attorneys," and despite the fact the envelope from Polestino had the legend "Attorney-At-Law" typed on it, in addition to the Law School address. Moreover, Polestino had been on Plaintiff's correspondence for a year, and the matter could have been checked by reference to Stegg's own records.

If we are correct in asserting the Plaintiff alleged a violation of his constitutional rights by the alleging that attorney-client correspondence was opened and read by prison personnel, and that any language to the contrary in Sostre should be disapproved, then summary judgement in his favor should have been

granted on the issue of liability.

The affidavits and documents establish that the three letters and the brief were opened and processed as if they were general, not legal correspondence, even though Polestino had been Plaintiff's attorney of record for a year and a record of such correspondence was maintained in the prison, even though the envelope containing the brief had the legend "Attorney-at-Law typed on it and even though Plaintiff submitted additional proof that Polestino was "a competent attorney" before the last 2 letters were received and opened.

The justifications advanced by the defendants for failing to treat the mail between Polestino and Plaintiff as private legal correspondence are insufficient in fact and in law and do not raise any material issue of fact for resolution at a trial. 10 Wright, Federal Practice and Procedure §2712, p 384; 6 Moore, supra, §56.15[1.-02]

Seeley's averment that he had no knowledge one way or another as to whether the lst letter was treated as general correspondence is clearly insufficient. Belinsky v Twentieth Restaurant, Inc., 207 F. Supp 412 (SDNY, 1962). (The "defendant cannot simply plead ignorance in lieu of contraverting facts demonstrated by the movant.") 6 Moore, supra, §56.15[3], p.2345 n. 37. His other excuses are also insufficient, if not downright

frivolous. Seeley's physical condition was irrelevant legally and factually. He was not the only officer in the correspondence unit and if he were unable to deliver the letter properly, then others could have. His speculation that perhaps the letter did not carry a proper return address or indication it was from an attorney is contraverted by the letter itself and the fact that Polestino and plaintiff had corresponded for a year, and a correspondence list was maintained in the correspondence unit office. His statement that if the act were done, it was "inadvertent" raises a sham issue, since he previously stated he had no personal knowledge of the facts one way or another. Moreover, §1893 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v Pape, 365 US 167, 187 (1961) A defense of 'if I did it I didn't mean to' is essentially a sham defense.

The Stegg affidavit is equally insubstantial. Stegg's averment that plaintiff's claims "are not true" was a conclusion based upon his stated belief that all legal correspondence was dealt with in accord with Admin. Bull. #20. The fact that the 3 letters and the brief were stamped with the general correspondence censor's stamp refutes this, as does Stegg's own admission in his earlier written statement to plaintiff that the brief was not treated as legal mail because he refused to assume law schools

were staffed by competent attorneys.

Stegg's further statement in the affidavit that the brief was opened in plaintiff's presence is contradicted by this earlier written admission that the Polestino brief was not treated as legal correspondence because he couldn't assume a St. John's Law School professor was a competent attorney and also by his statement that legal correspondence from Polestino "will" be treated as confidential once plaintiff submitted "proof of attorney."

The further facts that Polestino had been attorney-of-record for a year, that a correspondence list was maintained by Stegg, and that "Attorney-At-Law" was typed on the envelope bearing the brief, all demonstrate that Stegg had nojustification whatsoever for treating the brief as general correspondence.

Moreover, the fact that two additional letters were treated as general correspondence even after plaintiff gave Stegg the "proof of attorney" defeats any claim that the mail was opened because the officers had no knowledge it was legal mail.

We submit that the uncontraverted facts prove that Plaintiff established a violation of his First, Sixth and Fourteenth Amendment rights by establishing that correction officers failed to treat mail from his court assigned attorney relating to a pending criminal appeal as privileged and confidential.

Even assuming that the Court decides to adhere to the

Sostre formulation, the Plaintiff still pleaded and proved facts entitling him to relief under the Civil Rights Act, and hence it was error to dismiss the complaint.

Plaintiff alleged that a portion of his appellate brief was deleted by prisons officials. The defendants denied that such censorship occurred. Plaintiff submitted a letter from his assigned counsel which supported his allegation. (Plaintiff's Ex. 3 & 3A). No defense*, under Sostre, was tendered. The pleadings and affidavits and other papers before the district court did show a "genuine issue as to [some] material fact requiring a trial." United States ex rel Haymes v Montanye, supra, Slip op. at 25. Accordingly, it was error to dismiss the complaint without a trial on that disputed issue. Even if Sostre is not overruled, the case must be remanded to the district court for a full determination as to whether the correspondence from Plaintiff's attorney was censored.

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* ie a showing that the deleted correspondence posed "a clear and present threat to prison discipline or security... "Wilkinson v Skinner, supra, 462 F2d at 673.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE ORDER APPEALED FROM MUST BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT, EITHER WITH DIRECTIONS TO GRANT SUMMARY JUDGMENT FOR THE PLAINTIFF ON THE ISSUE OF LIABILITY AND TO TRY THE ISSUE OF DAMAGES; OR ALTERNATIVELY, FOR A TRIAL ON BOTH ISSUES.

Respectfully submitted,

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277 Broadway
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Dated: New York, New York
December 11, 1974

I hereby certify that a copy of the within was served by mail this date on the attys for the appellee

Dec 13, 1971 — G W Oberman